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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 785

NATIONAL GARMENT COMPANY, a Corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION AND SUPPORTING BRIEF FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals,
Eighth Circuit.

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SUPREME COURT OF THE UNITED STATES.

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No. .....

NATIONAL GARMENT COMPANY, a Corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals, Eighth Circuit.

Now comes the National Garment Company, a Missouri corporation with offices in St. Louis, Missouri, and prays that a Writ of Certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals, Eighth Circuit, entered on February 5, 1948, enforcing an order of the National Labor Relations Board.

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals in this connection is set out in National Labor Relations Board v. National Garment Company et al., **166 F. 2nd 233.** The order of the National Labor Relations Board is set out in **69 N. L. R. B. 1208** (Transcript pages 71-74).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

A petition (Transcript page 70) was filed on May 16, 1947, by the old National Labor Relations Board in the United States Circuit Court of Appeals, Eighth Circuit, for enforcement of its order issued on August 6, 1946, against the National Garment Company and the Wells-Wear Company.[1] The order provided for posting of notices; for reinstatement of one employee with back pay; back pay for 19 other employees (who were re-employed before the complaint of the Board was filed); and contained conventional cease and desist provisions, and a requirement to bargain collectively with a certain union.

Before the case was submitted the National Labor Relations Act (49 Stat. 449, 29 U. S. C. A. 151) was amended on the 23rd of June, 1947 (Public Law 101, 80th Congress, Chap. 120, 1st Sess. H. R. 3020; 29 U. S. C. A. 151) in the following respects material to issues herein:

a) Quality of evidence to be considered in Board proceedings [Section 10 (b)].[2]

b) Amount of evidence essential for Board findings and actions [Section 10 (c)].[3]

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1 The National Garment Company is the sole petitioner herein as the Wells-Wear Company is out of business and no longer has a corporate existence.

2 The amended Act, Section 10 (b), requires that proceedings on a complaint of the Board "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States . . .", whereas the old Act, Section 10 (b), stated specifically: "In any such proceeding the rules of evidence prevailing in Courts of law or equity shall not be controlling."

3 The amended Act, Section 10 (c), requires the Board to state its findings of fact based "upon the preponderance of the testimony taken." The old Act, Section 10 (c), permitted the Board to state its findings of fact based "upon all the testimony taken."

c) Essentials in record as a basis for judicial enforcement of Board action by U. S. Courts [Section 10 (e)].[4]

d) Back pay orders which may be made by Board [Section 10 (c)].[5]

e) The amendments[6] were to become fully effective August 22, 1948 (Section 104).[7]

The amendments were called to the Court's attention; and it was pointed out that the order of the old Board up for enforcement did not contain findings prerequisite to enforceable orders of the new Board under Section 10 (c) of the Act as amended.[8]

However, as will be seen from the opinion, the Board's petition was ruled on "as of the date of issuance of the order" without giving effect to the aforesaid amendments. The decree nevertheless was issued February 5, 1948. The Court also ruled that the "General Savings Statute"

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4 The amended Act, Section 10 (e), provides as a standard for the Court on reviews of Board orders: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." The old Act, Section 10 (e), read: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive."

5 Section 10 (c), with reference to affirmative action which the Board can order upon proper findings to effectuate the policies of the Act was amended by inclusion of a new provision, reading: "Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him."

6 Text of applicable amendments is set out in Appendix, commencing page 25.

7 Sec. 104 (Public Law 101, 80th Congress, Chap. 120, 1st Sess. H. R. 3020) reads: "The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by Section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith."

8 For applicable excerpts from House Conference Report No. 510, June 3, 1947, see Appendix, page 30.

(1 U. S. C. A. 29)[9] with reference to effect of **repealing** statutes was applicable to the **amendatory** "legislation here under consideration."

Petitioner urged before the appellate court that the Board's order with reference to back pay, which was not coupled with an order of reinstatement, was beyond the authority of the board, citing **N. L. R. B. v. Carlisle Lumber Co.** (9th Cir.), 99 F. (2d) 533, 537, and the language contained in the amendment to Sec. 10 (c).[10] The Court, in disposing of the issue, cited its own ruling in **N. L. R. B. v. Skinner & Kennedy Co.**, 113 F. (2d) 667, 669 (July 25, 1940), as contrary to the decision in the Carlisle Lumber Co. case, and the Court added, "We think our ruling is in accord with Phelps-Dodge Corp. v. N. L. R. B., 313 U. S. 177, 197-200, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A. L. R. 1217, and N. L. R. B. v. Link Belt Company, 311 U. S. 584, 61 S. Ct. 358, 85 L. Ed. 368." However, the Court did not pass upon the effect of the above-cited amendment on the power of the Board to issue an order for back pay not coupled with an order of reinstatement.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code [28 U. S. C., paragraph 347 (a)]. The Judgment and Decree of the Court of Appeals was entered on February 5, 1948, on the same date that "Petition for Rehearing" and "Objections to Proposed Decree" were overruled (Transcript [Fol. 36] page 32).

QUESTIONS PRESENTED.

1. Whether the Court, on a petition for enforcement of a Board order, must apply the new standards for Board and Court action contained in the National Labor Rela-

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9 For text, see Appendix, page 33.

10 See Footnote 5.

tions Act as amended,[11] and in effect at the time of its ruling?

2. Whether a Board's order [which, under Sec. 10 (e) of the Act (before or after amendments) could be enforced, modified, or enforced as modified, or set aside in whole or in part by the Court] is of such final nature that the Board may not be required to conform to new standards for Board action contained in remedial legislation in effect after rendition of the Board's order and before an enforcement decree is entered?

3. Whether the Board under sec. 10 (c) of the Act,[12] before its amendment, could issue an enforceable order for back pay unless coupled with an order of reinstatement for the same employees, and if the answer is in the affirmative, whether a court in an enforcement proceeding after the amendment to Sec. 10 (c), with reference to back pay orders,[13] can disregard the effect of the amendment?

4. Whether the General Savings Statute (16 Statutes 431, 1 U. S. C. 29)[14] pertaining to effect of **repealing** legislation has any bearing on construction of **amendments** to the National Labor Relations Act so as to prevent a reviewing court from applying an amendment to the Act, Sec. 10 (c), with reference to back pay orders, or new standards set out in amended Act controlling Board and Court action?

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11 (Public Law 101, 80th Congress, Chap. 120, 1st Sess. H. R. 3020, known as "Labor Management Relations Act 1947"). For details see footnotes 2, 3, 4, 5, 6, 7, 8.

12 (49 Statutes 449.)

13 See Footnote 5.

14 For text, see Appendix, p. 33.

REASONS FOR GRANTING THE WRIT.

1. The questions presented are of great public importance involving application of amendments to the National Labor Relations Act (Public Law 101, 80th Congress, Chap. 120, 1st Sess. H. R. 3020, June 23, 1947) not heretofore ruled on by this Court. The pertinent amendments are specified under our "Summary Statement of Matter Involved." They pertain to quality of evidence, standards for valid Board orders and Court action, and under what circumstances the Board may order affirmative action with reference to back pay.

2. The construction of the General Savings Statute (1 U. S. C. A. 29) which pertains to repealing statutes and its application to **amendatory** legislation is also a point in issue and of widespread importance.

3. The opinion of the Court of Appeals in the present case is in conflict with holdings of other circuit courts of appeals which have given effect to amendments of the Act. See **L. A. Young Spring and Wire Corp. v. N. L. R. B.** (U. S. Ct. App. D. of C.), 163 F. (2d) 905, 907 (Sept. 29, 1947), and **N. L. R. B. v. E. C. Atkins & Co.** (7th Circuit), 165 F. (2d) 659 (Sept. 24, 1947); also **N. L. R. B. v. Carlisle Lumber Co.** (9th Circuit), 99 F. (2d) 533, 537 (October 15, 1938), pertaining to limitations on authority of the Board to order back pay unless coupled with an order of reinstatement.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. .....

NATIONAL GARMENT COMPANY, a Corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF

In Support of Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Eighth Circuit.

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals in question is National Labor Relations Board v. National Garment Company et al., **166 F. 2nd 233**. The order of the National Labor Relations Board is set out in **69 N. L. R. B. 1208** (Transcript pages 71-74).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code [28 U. S. C., paragraph 347 (a)]. The Judgment and Decree of the Court of Ap-

peals was entered on February 5, 1948, on the same date that "Petition for Rehearing" and "Objections to Proposed Decree" were overruled (Transcript [fol. 36] page 32).

STATEMENT OF THE CASE.

The accompanying petition for certiorari sets out the salient facts in the case.

SPECIFICATIONS OF ERROR TO BE URGED.

The United States Court of Appeals, Eighth Circuit, erred:

1. In failing to apply the standards for **Board** action in the Act as amended[15] [Sections 10 (b) and 10 (c)] and in effect at the time of submission of the petition for enforcement.

2. In failing to apply the standards for **Court** action in the Act, as amended [Section 10 (e)] and in effect at time petition for enforcement was submitted for Court action.

3. In ruling in **1948** on the petition for enforcement "as of the date of the issuance of the order" without giving effect to amendments of the National Labor Relations Act [Sections 10 (b), 10 (c) and 10 (e)] which became fully effective (Section 104) August 22, **1947.**

4. In ruling that the Board under Section 10 (c) of the Act[16] was empowered to order back pay for workers who had resumed their employment before Board action.

5. In failing to pass upon the significance of the amendment to Section 10 (c) pertaining to back pay orders.[17]

6. In ruling that because of the "General Savings Statute" (16 Statutes 431, 1 U. S. C. 29) which pertains to effect of **repealing** legislation, "all things done" under the old law must stand, despite the **amendments** to Sections 10 (b), 10 (c) and 10 (e) then in effect, and the fact the National Labor Relations Act was **amended**—and not **repealed.**

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15 Public Law 101, 80th Congress, 1st Sess., H. R. 3020.

16 National Labor Relations Act, 49 Stat. 449; 29 U. S. C. A. 160.

17 Section 10 (c), with reference to affirmative action which the Board can order upon proper findings to effectuate policies of the Act, was amended by inclusion of a new provision, reading, "Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him."

ARGUMENT.

The Abuses Under the Act Were so Intolerable That the Amendments Under Consideration Were Enacted by Way of Remedy.

The amendments to the National Labor Relations Act became wholly effective on August 22, 1947. The only savings provisions in the amended act are to be found in Sections 102 and 103.[18]

The abuses under the old Act called for remedial legislation. A compendium of the abuses may be found in the House Conference Report No. 510, June 3, 1947.[19] We shall not repeat them. In order to remedy the shocking injustices described in the report, which cited numerous court decisions by way of illustration, the amendments to the Act in present form were finally agreed on. With reference to them, the Report[20] states:[21]

> "The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by **substantial evidence on the record considered as a whole.** The provisions of section 10 (b) of the conference agreement insure the Board's receiving only legal evidence, and section 10 (c) insures its deciding in accordance with the preponderance of the evidence. These two statutory requirements in and of themselves give rise to questions of law which the courts **will hereafter be called upon**

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18 For text see Appendix, pp. 29-30.

19 Relevant excerpts from House Conference Report are contained in Appendix, p. 30.

20 Congressional Record, Vol. 93, p. 6467.

21 See pp. 17-20 of monograph, "Analysis of Labor Management Relations Act, 1947," by Gerhard P. Van Arkel, former general counsel of National Labor Relations Board, published by Practicing Law Institute.

> **to determine**—whether the requirements have been met. This, in conjunction with the language of the Senate Amendment with respect to the Board's findings of fact—language which the conference agreement adopts—**will very materially broaden the scope of the court's reviewing power.** This is not to say that the courts will be required to decide any case de novo, themselves weighing the evidence, but they will be under a duty to see that the Board observes the provisions of the earlier sections, that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others **without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings.''** (Emphasis ours.)

The evils in the administrative process Congress sought to cure with the amendments were not limited by any savings clauses.

We repeat that after August 22, 1947, with the exception of the few items referred to in Sections 102 and 103 of the amended Act, the Act as amended became fully operative.

In Construing Amendments, the Evils Arising Under the Old Law and the Remedy Provided by the Amendment Should Be Considered, and That Construction of the Amended Act Should Be Adopted Which Will Best Repress the Evils and Advance the Remedy.

In **McClure v. United States**, 95 F. (2d) 744 (9th Circuit), the opinion deals with statutory construction and the effect of amendments. It quotes from **Blair v. Chicago**, 201 U. S. 400, 475, 26 S. Ct. 427, 446, 50 L. Ed. 801, as follows:

> "'The rule was thus stated in Farrell v. State, 54 N. J. Law 421, 24 A. 725: "As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended . . ."'"

See **Connett v. City of Jerseyville,** 96 F. (2d) 393, 400 (7th Circuit), for illuminating discussion; **Kindleberger v. Lincoln Natl. Bank of Washington,** 155 F. (2d) 281 (Ct. of App. D. C.); **Bowles v. Strickland,** 151 F. (2d) 419, 420 (5th Circuit).

59 C. J., p. 1093 et sequitur, with reference to the construction of amendments, reads:

> "The intention of the legislature is the primary object in the construction of statutory amendments . . . and in arriving at the intent, the court may look to the body of the act, its caption, and its emergency clause . . . The old law should be considered, the evils arising under it, and the remedy provided by the amendment, and that construction of the amended act should be adopted which will best repress the evils and advance the remedy . . ."

The Court on Petition for Enforcement of a Board Order Must Apply the New Standards for Board and Court Action Under the Act as Amended.

The new Board appointed and existing under and by virtue of the amendments to the Act, prosecuted the petition for enforcement of the pending order after August 22, 1947. In effect, it made the Order its own. The only kind of orders which it could make under the amended Act would have to be in conformance to Sections 10 (b) and 10 (c) of the Act as amended as well as other provisions thereof. Its findings would have to be based upon compe-

tent evidence [10 (b)] and upon a preponderance of the testimony [10 (c)]. The orders which it presses for enforcement must be administratively complete in accordance with the law under which it functions. It was never intended that two materially different administrative standards could be observed after the effective date of the amendment to effectuate the policies of the Act.

Courts in passing upon orders of the Board after August 22, 1947, function under and by virtue of the amended Act. All amendments were enacted at one time. It was not intended that some should be observed and others ignored after the effective date. The amended Act is an undivided whole and the Court in deriving its authority from the terms of the Act must consider it as amended, not only with reference to its powers and duties, but with reference to the powers and duties of the Board. We find nothing in the Act giving the Court the right to invoke its own savings clauses. To apply the law "as of the date of the order" is not applying the law under which the Court operates.

In Section 10 (e) of the Act as amended, new standards for judicial review are to be found. The standard for the Court is materially different than "as of the date of the order" it was enforcing in the case at bar. It did not follow the standards of the law under which it was functioning at the time of the submission of the matter. In Section 10 (e) we now read: "The **findings** of the Board with respect to questions of fact if supported by **substantial evidence** on the record considered as a whole shall be conclusive." (Emphasis ours.)

The word "findings" must be read together with Section 10 (c), which calls for findings "upon a preponderance of the testimony." Section 10 (c) must be read together with Section 10 (b) which calls for evidence in accordance

with the rules of evidence applicable in the District Courts of the United States.

Courts of appeal have been mindful of their duty to apply the Act as amended in judicially reviewing orders entered by the old Board. See **L. A. Young Spring and Wire Corp. v. N. L. R. B.** (Ct. App. D. of C.), 163 F. (2d) 905, 907 (Sept. 29, 1947), and **N. L. R. B. v. E. C. Atkins & Co.** (7th Circuit), 165 F. (2d) 659, 660 (Sept. 24, 1947); **Eastern Gas & Fuel Assoc. v. N. L. R. B.** (6th Circuit), 163 F. (2d) 864, 866 (Sept. 8, 1947).

Although the facts in the foregoing cases are not parallel, the courts took cognizance of the public policy set out in the law as amended at the time of its decision. The **intent of Congress** was the guiding rule for the Courts in order to effectuate the policies of the Act.

Aside from the question of the power of the Board to order back pay in the light of Section 10 (c) as amended, which we will dwell on separately, it is our contention that for a Court to apply at present the terms of an old law and bygone standards to effectuate the policies of an amended Act which contains new standards for Board and Court action is a denial of Congressional purpose and a repudiation of Congressional objectives and of the due process intended by Congress.

Board and Court Have Separate Functions and Board Orders Are Neither Final Nor Beyond Review.

We have not contended that all unenforced orders issued by the old Board are voided by the mere passage of the amendments—but that an unenforced order, like the one in issue, which does not on its face show **findings** conforming to the new standards for Board action, is not to be enforced by a court which is bound by the law as amended. In instances where orders are pending before

a Court, which are deficient in prerequisite findings for enforcement under the amended Act, the record should be remanded by the Court to the Board for appropriate findings in accordance with the Act as amended.

The Board, and not the courts, must make the prerequisite findings under Section 10 (c). In **Phelps Dodge Corp. v. N. L. R. B.**, 313 U. S. 177, 196, 85 L. ed. 1271, 1284, the Court stated:

> "The administrative process will best be vindicated by clarity in its exercise. Since Congress had defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders [Sec. 10 (e) and (f), 29 USCA, Sec. 160 (e) and (f)], it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board . . ."

Courts in enforcement proceedings have judicial functions. "The order of the Board is subject to review by the designated Court, and only when sustained by the Court, may the order be enforced." **Myers v. Bethlehem Shipbuilding Corp.**, 303 U. S. 41, 49, 82 L. ed. 638, 643. The Court has the obligation to search the record to ascertain if the order is enforceable. In doing so it must ascertain if the Board has conducted the proceedings in accordance with the law **then in effect, to effectuate the policies of the Act.** The Court has a real power of review with authority to enforce, modify, and enforce as so modified or set aside in whole or in part the order of the Board.

Injunctive Relief Must Be Determined as of the Time of the Hearing.

The order which the Board sought to enforce contained cease and desist provisions. When sustained by the Court, the order "is in effect an injunction." **N. L. R. B. v. Lipshutz,** 149 F. (2d) 141 (5th Circuit). Injunctions operate only in futuro and the right to one must be determined as of the time of the hearing. **Duplex v. Deering,** 254 U. S. 443, 464; **Texas v. Brown,** 258 U. S. 466, 474, 66 L. ed. 721, 725, 726.

In **Vandenbark v. Owens-Illinois Glass Co.,** 311 U. S. 538, 541, 85 L. ed. 327, 329, the Court restated:

> "It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."

The above was by way of quotation from U. S. v. The Peggy, 1 Cranch 103, 110, 2 L. ed. 49, 51. The Court (Mr. Justice Reed) continued:

> "It is true this Court was speaking of the intervention of a treaty and also that it expressed a caution against retrospective operation between private parties but the principle quoted has found acceptance in a variety of situations."

The Court then cited several cases, including Patterson v. Alabama, 294 U. S. 600, 607, 79 L. ed. 1082, 1086; Carpenter v. Wabash Railway Co., 309 U. S. 23-29, 84 L. ed. 559, 562. Also see Ziffrin v. United States, 318 U. S. 73, 78, 87 L. ed. 621, 625; Watts, Watts & Co. v. Unione Austriaca etc., 248 U. S. 9, 21.

The General Savings Statute Pertaining to Effect of Repealing Legislation Has No Bearing on Construction of Amendments to National Labor Relations Act.

The General Savings Statute[22] enacted by Congress in 1871 which pertains to the effect of the repeal of a statute has been cited in the questioned opinion as preserving "all liabilities" arising under the National Labor Relations Act prior to its amendment, and the Court concluded that all things done in this matter under the old law must stand.

An examination of the above statute reveals that it pertains solely and strictly to **repealing acts.** In 1944 it was amended to include expiration of temporary statutes. Nowhere does it refer to amendments. Three times in its body it refers to the **"repeal"** of statutes. Section 29, being in contravention of the common law, must be strictly construed. Rodgers v. United States, 6th Cir., 158 F. (2d) 835, 836; Moore v. United States, 8th Cir., 85 F. 465, 470; United States v. Chambers, 291 U. S. 217; United States v. Auerbach, D. C. S. D., Cal., 68 F. Supp. 776.

The Labor-Management Relations Act, 1947, is not a repealing statute, but an amendatory act. It uses the words **"amend"** or **"amendment"** in six reference to the Act. **"Repeal"** is not mentioned.

An examination of the House Bill (H. R. 3020) and of the Senate Bill (S. 1126) as reported by their appropriate committees discloses that the bills were considered as amendatory to the National Labor Relations Act. There was no repealing section in either of the bills.

It follows, therefore, that the General Savings Statute, **which pertains strictly to repeals,** has no bearing on the

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22 For text see Appendix, p. 33.

construction of the amendments to the National Labor Relations Act.

An Order of the Board, Whether Under Old Section 10 (c) or the New Section 10 (c), Cannot Be Made for Back Pay Unless Coupled With an Order of Reinstatement.

Section 10 (c) of the old Act with reference to affirmative action which the Board could take read: "If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action, **including reinstatement of employees with or without back pay**, as will effectuate the policies of this Act." The sentence aforesaid was amended by striking out the words "all the testimony taken" and by substituting "the preponderance of the testimony," as previously noted, and there was added to the foregoing sentence with a connecting colon, "**Provided, that where an order directs reinstatement of an employee** back pay may be required of the employer or labor organization as the case may be, responsible for the discrimination suffered by him." (Emphasis ours.) Full text of Section 10 (c) as amended is in Appendix, p. 26.

We contend that the Board, under Section 10 (c), as part of the affirmative action to effectuate the policies of the act, may not order restoration of back pay for workers who resumed their employment before the case came to the Board. And we make the foregoing assertion at this juncture without considering the amendment to Section 10 (c) relating to back pay.

In **N. L. R. B. v. Carlisle Lumber Co.**, 9 Cir., 99 F. (2d) 533 (October 15, 1938), the Court held that the Board had

no power to order the payment of back pay unless coupled with an order of reinstatement. We quote:

> "A more critical examination of the reinstatement provision is required by the contentions of respondent. The statute says that the Board may order 'reinstatement of employees with or without back pay.' While the act permits the Board to reinstate with or without back pay, it does not, I think, permit an award of back pay without reinstatement, because the back pay provision is connected with and dependent upon the reinstatement provision. It can be seen from the quoted portion of the committee report that the provisions were not placed in the act specifically to benefit employees, although they may have such effect, but were designed to insure that an employer would cease unfair labor practices. In other words, I think Congress was dealing with causes of obstructions affecting commerce, and not with the relationship of master and servant as such. For these reasons, I decline to follow Mooresville Cotton Mills v. National Labor R. Board, 4 Cir., 94 F. 2d 61, 66. It was there said that back pay might be awarded without reinstatement because it 'would not offend the terms of the act, would do justice to the worker and would tend to effectuate the policies of the act.' I think such a construction offends the terms of the act, and what would effectuate the policies of the act is a legislative question for the Board, subject only to the constitutional prohibitions applicable to all such administrative agencies. It may be that such an order could be said to 'do justice to the employee,' yet I think that the real purpose of the statute was to deal with obstructions affecting commerce and that such purpose must be controlling in a construction of the act.
>
> "The only apparent basis for a construction which would permit 'back pay' without reinstatement is by

considering that such power arises from the Board's power to order a person guilty of unfair labor practices 'to take such affirmative action * * * as will effectuate the policies of this Act' independently of the words omitted from that quotation, which are: 'including reinstatement of employees with or without back pay.' I believe that since 'reinstatement' and 'back pay' were singled out for special treatment, it was intended that the general words were to be limited thereby."

In our Motion for Rehearing (p. 8), with reference to that portion of the opinion which disagreed with the ruling in the Carlisle Case, we stated:

"The court, in overruling Respondents' contention that the order with reference to back pay was void because not coupled with an order of reinstatement and because the workers had resumed their employment before the case came to the Board, disagreed with the decision in the Carlisle Lumber Company case, 99 F. (2d) 533 (certiorari denied 306 U. S. 646). This court stated that in N. L. R. B. v. Skinner-Kennedy Stationery Co., 113 F. (2d) 667, 669, it had ruled contrary to the contention long after the decision in the Carlisle Lumber Company case. However, the court overlooked the fact that the precise point was not up for judgment in the Skinner-Kennedy case, and that no issue such as here and in the Carlisle Lumber Company case was submitted in briefs for determination.

"In the Link Belt Company case, 311 U. S. 584, cited by the court, there was no issue with reference to the right of back pay without an order of reinstatement. In a footnote to a comment on page 600, also to be found in 85 L. Ed. 379, we read: 'The Board ordered

no affirmative relief with respect to Salmons as he had been reinstated under an agreement with the company that he would not receive back pay,' but aside from whether the Supreme Court has inferentially overruled the rationale in the Carlisle Lumber Company matter, this court inadvertently failed to comment upon a most significant amendment in the present law, to which its attention was directed on page 30 of Respondents' Brief and pages 16 and 17 of their Reply Brief. That amendment to Sec. 10 (c) of the National Labor Relations Act added the following provision (emphasis ours):

> " 'Provided, **That where an order directs reinstatement of an employee,** back pay may be required **of the employer or labor organization,** as the case may be, responsible for the discrimination suffered by him.'

"We construe that to be a limitation on the right to order back pay—and a vindication of the Carlisle Case interpretation of Congressional intent."

* * * * * * *

If this Court in **Phelps Dodge Corp. v. N. L. R. B.,** 313 U. S. 177, 197-200, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A. L. R. 1217, inferentially or silently reversed the Carlisle Lumber Company decision, Congress in amending the law in a manner supporting the rationale of the Carlisle case has made the force of any such decision in the Phelps Dodge case inoperative. We quote from Sutherland on Statutory Construction, page 431, Sec. 1935:

> "If the section as amended is inconsistent with prior judicial interpretation of related sections, it is presumed that the legislature knew thereof, and the amendment controls. In the absence of express evidence to the contrary, the section as amended is to be

construed to have the same scope as the unaltered section of the original statute."

Based on all of the foregoing considerations, we conclude that an order of the Board, whether under the old Section 10 (c) or the new Section 10 (c), cannot be made for back pay where the workers resumed their employment before the case came before the Board, as there could be no order of back pay coupled with an order of reinstatement under such circumstances. The hiatus in the law with reference to the Board's powers is not accidental. The Board does not have unbridled authority. **Republic Steel Corp. v. N. L. R. B.**, 311 U. S. 7, 11, 12, 85 L. Ed. 6, 10.

IN CONCLUSION.

The granting of the Writ and subsequent decision by this Court will clarify many labor-management law problems, and be of general interest on statutory interpretation.

Respectfully submitted,

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Attorneys for Petitioner.

May 4, 1948.

APPENDIX.

Excerpts from National Labor Relations Act (49 Statute 449).

10 (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

10 (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall

issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If, upon all the testimony taken, the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

10 (e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not

been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Excerpts from Labor Management Relations Act, 1947 (Public Law 101, 80th Congress, Chap. 120, 1st Sess., H. R. 3020).

10 (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to

be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

10 (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the

complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as

the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

10 (e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfac-

tion of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Sec. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the

National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

Sec. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

Sec. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

Excerpts from House Conference Report No. 510, June 3, 1947.

(7)[1] In section 10 (c) the House bill provided that the Board should base its decisions upon the "weight of the evidence." The Senate amendment retained the present language of the act, permitting the Board to rest its orders upon "all the testimony taken." The conference agreement provides that the Board shall act only on the "preponderance" of the testimony—that is to say, on the weight of the credible evidence. Making the "preponderance" test a statutory requirement will, it is believed, have important effects. For example, evidence could not be considered as meeting the "preponderance" test merely by the drawing of "expert" inference therefrom, where it would not meet that test otherwise. Again, the Board's decisions should

1 Congressional Record Vol. 93, p. 6467.

show on their face that the statutory requirement has been met—they should indicate an actual weighing of the evidence, setting forth the reasons for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, for drawing this inference rather than that. Immeasurably increased respect for decisions of the Board should result from this provision.

(14) Under the language of section 10 (e) of the present act, findings of the Board, upon court review of Board orders, are conclusive "if supported by evidence." By reason of this language, the courts have, as one has put it, in effect "abdicated" to the Board (N. L. R. B. v. Standard Oil Company, 138 Fed. [2d] 885 [1943] [13 LRR Man. 588]; see also Wilson & Co. v. N. L. R. B., 126 Fed. [2d] 114 [1942] [10 LRR Man. 354]; N. L. R. B. v. Columbia Products Corp., 141 Fed. [2d] 687 [1944] [14 LRR Man. 558]; N. L. R. B. v. Union Pacific Stages, Inc., 99 Fed. [2d] 153 [3 LRR Man. 698]). In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact (N. L. R. B. v. Hearst Publications, Inc., 322 U. S. 111 [14 LRR Man. 614]; N. L. R. B. v. Packard Motor Car Co., decided March 10, 1947 [19 LRRM 2397]), or when they rested only on inferences that were not, in turn, supported by facts in the record (Republic Aviation v. N. L. R. B., 324 U. S. 793 [16 LRR Man. 620]; Le Tourneau Company v. N. L. R. B., 324 U. S. 793 [16 LRR Man. 620]).

As previously stated in the discussion of amendments to section 10 (b) and section 10 (c), by reason of the new language concerning the rules of evidence and the preponderance of the evidence, presumed expertness on the part of the Board in its field can no longer be a factor in the

Board's decisions. While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included, both in the House bill and the Senate amendment, language making it clear that the act gives to the courts a real power of review.

* * * * * * *

The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evidence on the record considered as a whole. The provisions of section 10 (b) of the conference agreement insure the Board's receiving only legal evidence, and section 10 (c) insures its deciding in accordance with the preponderance of the evidence. These two statutory requirements in and of themselves give rise to questions of law which the courts will hereafter be called upon to determine—whether the requirements have been met. This, in conjunction with the language of the Senate amendment with respect to the Board's findings of fact—language which the conference agreement adopts — will very materially broaden the scope of the court's reviewing power. This is not to say that the courts will be required to decide any case de novo, themselves weighing the evidence, but they will be under a duty to see that the Board observes the provisions of the earlier sections, that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence in making decisions.

It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in N. L. R. B. v. Nevada Consol. Copper Corp., 316 U. S. 105 [10 LRR Man. 607] and in the Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation, and Le Tourneau, etc., cases, without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into section 10 (e) of the amended act.

General Savings Statute.

"Repeal of Statutes as Affecting Existing Liabilities.—The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability" (R. S. 13) (Act of Feb. 25, 1871, Ch. 71, Section 4, 16 Stat. 432) (Title 1, Section 29, U. S. C. A.).

Note: The above Act was amended in 1944 with reference to effect of expiration of a temporary statute.